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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o Adams & Woodrow, S.C.
301 Nicolet Blvd
Neenah, WI 54956

DECISION

MDV/171354

PRELIMINARY RECITALS

Pursuant to a petition filed January 13, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Outagamie County Department of Human Services in regard to Medical Assistance, a hearing was held on February 03, 2016, at Appleton, Wisconsin.

The record was held open until February 24, 2016, to give Petitioner's attorney an opportunity to submit documentation of the Petitioner's cognitive decline. Petitioner's attorney submitted a fax including a bank statement, a statement of incapacity and Power of Attorney orders. It has been marked as Exhibit 21. Petitioner's attorney also submitted Petitioner's medical records, which have been marked as Exhibit 22.

The issue for determination is whether the Outagamie County Department of Human Services correctly determined that the Petitioner divested assets when she paid her son for room, board and other services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o Adams & Woodrow, S.C.
301 Nicolet Blvd
Neenah, WI 54956

Petitioner's Representative:

Attorney Benjamin M. Adams
301 Nicolet Blvd.
Neenah, WI 54956-2756

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Angela Demepwolf, Economic Support Worker
Outagamie County Department of Human Services
401 S. Elm Street
Appleton, WI 54911-5985

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Outagamie County.
2. In July 2008, Petitioner's husband passed away. Due to concerns about Petitioner's memory, she went to live with her son, DK in August 2008. She stayed with him through October 2008. (Exhibit 2; Testimony of DK)
3. Petitioner wanted to try and live on her own, and moved out of DK's home in November 2008. However, after leaving a tea pot on the stove and getting into a car accident, the Petitioner moved back in with DK in October 2009. (Exhibit 2; Testimony of DK)
4. On January 13, 2010, the Petitioner was diagnosed with early dementia. At that time, the neuropsychologist suspected early neurodegenerative dementia of the Alzheimer's type. (Exhibit 22)
5. In April 2010, the Petitioner went back to her old home for one last summer and then returned to live with DK in October 2010. The Petitioner lived with DK until April 16, 2015, when she went into a nursing home. (Testimony of DK)
6. On August 18, 2011, the Petitioner signed a power of attorney for health care and a durable power of attorney, appointing her son as her agent. (Exhibit 21)
7. Sometime between August 2011 and August 2012, Petitioner's physician determined that she needed constant supervision to prevent wandering/elopement. (Exhibit 22)
8. On July 26, 2012, the Petitioner transferred \$19,961.45 to DK and his wife, for the room and board they provided from August 2008 through July 2012. This works out to be a rate of \$623.80 per month, when one divides the payment by the 32 months the Petitioner lived with DK between August 2008 and July 2012. (Exhibits 7 and 21)
9. From August 2012 through March 2015, the Petitioner agreed to pay DK and his wife \$1200 per month for room, board and other services. On April 1, 2015, the Petitioner paid DK and his wife \$600, because she went into a nursing home in the middle of that month. So, the total payment to DK and his wife works out to be \$39,000.00, when one multiplies \$1200 by 32.5 months. (Testimony of DK, Exhibit 7)
10. No written agreement was executed by the Petitioner. (See Exhibit 9)
11. By July 22, 2014, two physicians determined that the Petitioner was incapacitated, meaning she was unable to effectively evaluate information and communicate decisions. (Exhibit 21)
12. On or about November 30, 2015, the Petitioner filed an application for Nursing Home Long Term Care Medicaid, seeking coverage effective November 1, 2015. (Exhibit 3)
13. On January 5, 2016, the agency sent the Petitioner a notice indicating that her application for healthcare benefits was denied for the months of November 1, 2015 through June 22, 2016. The agency did not state why, other than listing Wis. Stats. §49.453, which is a statute that covers the divestment of assets. (Exhibit 19)
14. Also on January 5, 2016, the agency sent the Petitioner a letter, indicating that she cannot enroll in Wisconsin Medicaid Long Term Care Services from November 1, 2015 through June 22, 2016, because she divested an unstated amount of assets. (Exhibit 20)
15. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on January 13, 2016. (Exhibit 1)

DISCUSSION

The agency did not state in its notices what amount of money it believes the Petitioner divested, nor did it show how it calculated the penalty period. However, it is clear from the statements of both parties, that the agency believes that some portion of what the Petitioner paid to her son for her care constitutes a divestment.

Such situations are addressed under Medicaid Eligibility Handbook (MEH) Section 17.8.

I. Care and Services

There are the three conditions that must exist in order to disregard payments made to relatives for care and other services:

17.8.1 Divesting by Paying Relatives Introduction

It is divestment when an institutionalized person transfers resources to a relative in payment for care or services the relative provided to him or her. A relative is anyone related to the institutionalized person by blood, marriage, or adoption.

Count all the payments for care and services which the institutionalized person made to the relative in the last 36 months. The form of payment includes cash, property, or anything of value transferred to the relative. **It is not divestment if all of the following conditions exist:**

1. The services directly benefited the institutionalized person.
2. The payment did not exceed reasonable compensation for the services provided.

"Reasonable compensation" is the prevailing local market rate for the service at the time the service is provided.

...

3. If the amount of total payment exceeds 10 percent of the *community spouse*  asset share (see Section 18.4.3 Calculate the CSAS), the institutionalized person must have a written, notarized agreement with the relative. The agreement must:

- a. Specify the service and the amount to be paid, and
- b. Exist at the time the service is provided.

...

If there is no community spouse, use 10 percent of the highest possible CSAS in Section 18.4.3 Calculate the CSAS.

Emphasis added; MEH §17.8.1

Petitioner's attorney provided a decision issued by ALJ Gagnon in case MDV/161655, in which she determined that fair market value for rent was \$500 per month and \$189 per month for food, for a total of \$689 per month for room and board. (See Exhibit 13) Petitioner stipulated that this was reasonable. (Exhibit 9)

On July 26, 2012, the Petitioner transferred \$19,961.45 to DK and his wife, for the room and board they provided from August 2008 through July 2012. This works out to be a rate of \$623.80 per month, when one divides the payment by the 32 months the Petitioner lived with DK between August 2008 and July 2012.

The rate of \$623.80 is less than the fair market rate of \$689.00 per month for room and board, so none of that amount, can be considered payment for care or services.

From August 2012 through March 2015, the Petitioner agreed to pay DK and his wife \$1200 per month for room, board and other services. In April 2015, she paid them \$600, because she went into a nursing home in the middle of that month. So, the total payment to DK and his wife works out to be \$39,000.00, when one multiplies \$1200 by 32.5 months.

\$689 fair market for room and board x 32.5 months = \$22,392.50.

\$39,000 total paid for room, board and services – \$22,392.50 fair market room and board = \$16,607.50 paid for care and services.

Petitioner has no community spouse, so one must compare the \$58,961.45 to 10% of the highest possible CSAS. It is undisputed that per MEH §18.4.3, that the highest possible CSAS is \$119,220. As such, 10% of that amount is \$11,922. (See Exhibit 1)

The \$16,607.50 paid for care and services, exceeds 10% of the highest possible CSAS. As such, in order to disregard that amount as a divestment, Petitioner needed to execute a written notarized agreement to meet the third criteria under MEH §17.8.1. She did not. Consequently, the transfer of the \$16,607.50 paid to DK for care and services must be considered a divestment. This finding is consistent with the decisions issued in cases MDV/161655 and MDV/156359, Exhibits 13 and 14 respectively.

This matter will have to be remanded to the agency to make a penalty period calculation, based upon a divestment of \$16,607.50.

II. Room and Board

17.8.2 Room and Board

If an institutionalized person has made room and board payments to a relative, disregard them if:

1. The payments do not exceed fair market value of the room and board, and
2. Are for periods when the institutionalized person was receiving the room and board.

If the room and board is paid after the person has been institutionalized, treat the payment as divestment unless:

1. The payment is only for the month immediately preceding the month he or she entered the institution, or
2. He or she provides a written lease that existed during the time he or she was receiving room and board from the relative.

MEH §17.8.2

In the case at hand, the Petitioner paid DK for room and board, before she entered the institution. The last payment was made on April 1, 2015. Petitioner entered the nursing home on April 16, 2015.

As discussed above, Petitioner's attorney provided a decision issued by ALJ Gagnon in case MDV/161655, in which she determined that fair market value for rent was \$500 per month and \$189 per month for food, for a total of \$689 per month for room and board. (See Exhibit 13) Petitioner stipulated that this was reasonable. (Exhibit 9)

The amounts paid were only for those periods in which the Petitioner actually lived with DK.

As such, the \$22,392.50 paid for room and board from August 2012 through April 16, 2016 and the \$19,961.45 paid for room and board provided between August 2008 and July 2012 should be disregarded pursuant to MEH §17.8.2

It should be noted that I am giving Petitioner the benefit of the doubt, regarding whether she fully knew or understood what she was doing in July/August 2012, when she transferred the \$19,000+ lump sum to DK and agreed to pay DK and his wife \$1200 per month for room, board and care. Though it is repeatedly stated in Petitioner's exhibits that she was suffering from Alzheimer's dementia and experiencing cognitive decline during the entire time in question, she was not deemed incapacitated until July 2014.

CONCLUSIONS OF LAW

Pursuant to MEH §17.8.1, the transfer of the \$16,607.50 to DK for care and services must be considered a divestment, because the Petitioner did not execute a signed notarized agreement.

THEREFORE, it is

ORDERED

The matter is remanded to the agency to calculate a penalty period, based upon a divestment of \$16,607.50. The agency shall issue a notice to the Petitioner/Petitioner's representative, clearly showing the divestment amount, and how it calculated the penalty period. The agency shall take all administrative steps to complete this task within ten days of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be received within 20 days after the date of this decision. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 and to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court and served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, and on those identified in this decision as "PARTIES IN INTEREST" no more than 30 days after the date of this decision or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 28th day of March, 2016

sMayumi M. Ishii